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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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ACTION.

Supreme Court of Kentucky

2010-SC-000728-MR

PAUL BASS, III

APPELLANT

V.

ON APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
NO. 07-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Paul Bass appeals as of right from a Judgment of the Bourbon Circuit Court convicting him of rape and sentencing him to a maximum term of twenty years in prison. Bass was found guilty of having had sexual intercourse with S.S., the eleven-year-old granddaughter of the man in whose home he was living. Bass denied S.S.'s allegations and now argues that the evidence against him was not sufficiently incriminating to justify his conviction and that the trial court should have directed a verdict of acquittal. Convinced that the trial court did not err by submitting the case to the jury, we affirm.

RELEVANT FACTS

The Commonwealth's proof established that in October 2007, Bass was living with his girlfriend, Leticia; Leticia's friend, Denise; and Leticia's eight-year-old daughter, L-S, at the farm home of Leticia's aunt and step-uncle

outside Paris, Kentucky. Leticia's step-uncle is S.S.'s grandfather, and S.S. was a frequent visitor at the farm.

S.S. spent the night there on October 19, 2007. The next morning, S.S. testified, her grandmother woke her about 7:00 to say goodbye and to give her some chores to do during the day. The grandmother then left to give Leticia and Denise a ride to work and to go to work herself. The grandfather had left for work already. That left Bass at home with S.S. and L-S. According to S.S., not long after her grandmother left, she and L-S were folding clothes when Bass called them into his bedroom. He was lying on the air mattress he used as a bed, and he first told L-S to be quiet and to go back to folding clothes. When L-S had left the room, Bass asked S.S. to rub his back.

S.S. testified that at first she refused and left the room, but that when Bass called her back and repeated his request she complied. While S.S. was rubbing Bass's back, Bass said to her, "I'm going to stick my dick in your pussy." He then proceeded to remove S.S.'s leggings, and, when S.S. told him to stop and clutched her panties in her fists, he squeezed her wrists to make her let go, removed her panties, and inserted one of his fingers into her vagina. S.S. told him to stop because it hurt, but the almost twenty-three year old Bass, who is six-feet five-inches tall and at the time weighed about two hundred twenty pounds, dismissed her distress, laid her on the mattress, and subjected her to intercourse.

He stopped, S.S. testified, upon exclaiming that he felt "something wet." When he withdrew, they found that S.S. was bleeding profusely from her

vagina. Bass told her to shower, and while she was doing so, he took her clothes and began laundering them. He later, S.S. testified, washed off the mattress with soap and water.

S.S. continued to bleed, and in the course of the day used several hygiene pads and two towels to contain the blood. Nevertheless, she testified, she dripped blood at several places in the home. When her grandfather returned from work, she did not tell him what had happened to her, because, she testified, she was afraid of Bass. When her grandmother got home, however, L-S told her that S.S. was bleeding, and the grandmother, discovering S.S.'s condition, immediately took her to the hospital.

S.S. was treated at the University of Kentucky Medical Center. The initial examining physician and a surgeon both testified that S.S. suffered a four centimeter (slightly more than an inch and a half) tear along the seam joining her vagina to her cervix. The examining physician testified that S.S.'s vagina had been pushed beyond its capacity to expand. Shown a cat toy—a long ribbon attached to what appears to be about a twelve to eighteen inch length of narrow dowel—and asked if such a dowel could have caused S.S.'s injury, the examining physician said that he would have expected a thicker object. The surgeon testified that stitches were necessary to reattach the vagina to the cervix and that S.S. had lost a significant amount of blood, as much as a liter, and had been transfused.

Upon questioning by hospital personnel, S.S. accused Bass of raping her. The hospital personnel then summoned the police. The lead investigator

testified that he interviewed S.S. there, that she repeated her allegations to him, and that she described the clothes she and Bass had been wearing, Bass having worn only a pair of black shorts. The investigator then interviewed Bass, who denied S.S.'s allegations, but admitted that he had worn the shorts. At the scene, the investigator found Bass's shorts on the floor beside his mattress and found S.S.'s clothes among what appeared to be other folded laundry. In waste baskets the investigator found several hygiene pads soaked, apparently, with blood, and near a laundry hamper he found two towels also, it appeared, heavily blood stained. On the floor at several places in the home, the investigator observed dark spots that, to the naked eye at least, appeared blood-like. Photographs of these items where and as found were introduced into evidence and shown to the jury.

The investigator testified that two days after the alleged rape, in response to a phone call from Bass's girlfriend, Leticia, he interviewed Leticia's daughter, then eight-year-old L-S. L-S told him that she had gone into the bathroom the day of the incident and found S.S. using her finger and a cat toy, the toy mentioned above, to masturbate. L-S told the investigator that S.S. had injured herself with the dowel part of the cat toy and that when she, L-S, asked S.S. why she had told the police that Bass injured her, she said that she wanted to get him in trouble. The investigator testified that he asked L-S how she knew about the police before S.S. had gone to the hospital, and that L-S's demeanor had immediately collapsed. The investigator asked her if someone had told her to say those things, and, looking down, she pointed towards her

mother. When he then asked what her mother had told her to say, L-S, appearing very abashed, said only, "the truth." L-S told the investigator where to find the cat toy—behind a piece of furniture—and the investigator collected it as evidence. At trial the then eleven-year-old L-S testified that she remembered very little about this incident. She remembered telling her "grandmother" that S.S. was bleeding, and she remembered going to the hospital. She did not remember seeing Bass that day, however, nor did she remember her interview with the investigator. When she was shown the cat toy and asked if she had ever seen S.S. masturbating with it, she said, "no." During cross-examination, however, when asked if she would have had any reason to lie to the investigator, she again said, "no."

The investigator testified that he sent four items to the state police crime lab for analysis: the cat toy, Bass's shorts, and the sexual assault evidence kits that had been collected from both S.S. and Bass. These items went first to a serologist, who examined them for the presence of bodily fluids such as blood, semen, or saliva. The serologist testified that a swab taken from the inside of Bass's shorts, low in the crotch and toward the inside of the left thigh, tested presumptively positive for blood. A spot slightly higher in the crotch tested positive for semen. She cut out that portion of the shorts and sent both the blood-positive swab and the cutting to a different branch of the state lab for DNA analysis. She also sent a blood-positive cutting from the ribbon portion of the cat toy, blood samples from both of the assault kits, an anal swab from S.S.'s kit, penile swabs from Bass's kit, and fingernail scrapings from Bass's

kit. She testified that her tests indicated the presence of blood at both ends of the cat toy dowel, but at both ends the amount of blood was very small. She did not take swabs from the cat toy or send the toy itself for further analysis.

The DNA analyst testified that no foreign DNA was obtained from any of the items she analyzed from the assault kits. The DNA profile she obtained from the blood-positive cat toy cutting matched S.S.'s profile at every loci. The expected frequency of that profile, according to the analyst, was one person in 1.7 sextillion. The blood-positive swab from Bass's shorts yielded a mixed DNA sample the combined profile of which was consistent with both Bass's and S.S.'s profiles at twelve of the fifteen tested loci, results at the other three loci being inconclusive. According to the analyst, the expected frequency of potential contributors to the mixture, as both Bass and S.S. were, was one person in 68 million. The cutting from Bass's shorts also yielded what appeared to be a mixed DNA sample, but the profile obtained was, in the analyst's judgment, inconclusive at too many loci to be useful.

Characterizing S.S.'s accusations as uncorroborated by the forensic evidence and as contrary to L-S's police statement, Bass maintains that his conviction was flagrantly against the weight of the evidence and that he was entitled to a directed verdict. We disagree.

ANALYSIS

As Bass correctly notes,¹ under both the common law of this state and

¹ Although the parties express concern that some aspects of Bass's argument were not properly preserved in the trial court, we need not address the preservation issue, if there is one, or the standard of review applicable to unpreserved directed

the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Commonwealth bore the burden of proving each element of his alleged offense beyond a reasonable doubt. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991); *Jackson v. Virginia*, 443 U.S. 307 (1979). This standard requires more of the Commonwealth than mere speculation. *Hodges v. Commonwealth*, 473 S.W.2d 811, 814 (Ky. 1971) (“Suspicion alone is not enough.”). The Commonwealth must produce evidence of substance. Evidence that amounts to no more than a scintilla of proof is grounds for a directed verdict. *Benham*, 816 S.W.2d at 187-88.

A directed verdict is not appropriate, however, if, construed favorably to the Commonwealth, the evidence would permit a rational juror to believe the defendant guilty beyond a reasonable doubt. *Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009) (citing *Benham*). In other words, in deciding upon the propriety of a directed verdict, the court, either trial court or reviewing court, must presume that if the evidence supports conflicting inferences the conflict will be resolved in favor of the prosecution. *Cf. McDaniel v. Brown*, ___ U.S. ___, 130 S. Ct. 665, 175 L. Ed.2d 582 (2010) (explaining the “rational juror” standard required under the Due Process Clause and citing *Jackson v. Virginia*). The credibility of witnesses, likewise, is generally left for the jury to determine. *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005) (citing *Schlup v. Delo*, 513 U.S. 298 (1995)). A single witness’s testimony may support a

verdict claims, because even under the standard of review for preserved claims Bass is not entitled to relief.

conviction, therefore, even if there is testimony to the contrary, provided only that it is not clearly unreasonable to credit the single witness. *Commonwealth v. Suttles*, 80 S.W.3d 424 (Ky. 2002) (single witness can be sufficient); *Robinson v. Commonwealth*, 212 S.W.3d 100 (Ky. 2006) (alleged rape victim's testimony sufficient to establish that intercourse occurred through forcible compulsion).

Here, the Commonwealth alleged a violation of KRS 510.040(b), which provides in pertinent part that “[a] person is guilty of rape in the first degree when: . . . [h]e engages in sexual intercourse with another person who is incapable of consent because [s]he: . . . [i]s less than twelve (12) years old.” Bass does not dispute that the Commonwealth proved S.S.’s age and that in October 2007 she was eleven. With respect to the sexual intercourse element, in addition to S.S.’s direct testimony that intercourse occurred, the Commonwealth’s proof included evidence that Bass had been home alone with the two young girls and that Bass had been in his room alone with S.S.; medical testimony to the effect that S.S. suffered a serious vaginal injury consistent with her small body having been penetrated by a large man; and forensic testimony to the effect that DNA matching S.S.’s was on the inside crotch area of Bass’s shorts. While not overwhelming, perhaps, this evidence is plainly substantial and far more than speculative and is sufficient to permit a rational juror to believe Bass guilty beyond a reasonable doubt. The trial court did not err, therefore, by denying Bass’s directed verdict motion.

Against this conclusion, Bass refers us to *Coney Island Co. v. Brown*, 290 Ky. 750, 162 S.W.2d 785 (1942), for the proposition that a judgment should

not be allowed to stand on testimony so clearly at odds with natural laws or other similarly undisputed facts that no rational juror would credit it. In that case a steamboat passenger sued the boat's owner and alleged that the boat's sudden start away from the wharf caused the boat to lurch, which in turn caused the plaintiff to fall and be injured. Expert testimony at trial was to the effect that it was physically impossible for the boat to have started with a jerk or a lurch, and in the face of that testimony, the Court held, the plaintiff's account of her accident could not have been accurate and did not support the verdict in her favor.

Bass asserts that S.S.'s account of what happened to her is similarly unreliable since "according to the ordinary operation of physical forces," there should not have been so little evidence of sexual contact. Bass has not identified, much less offered expert testimony regarding, the "physical forces" to which he refers, but his claim is apparently that because "there was no sperm and no semen found on S.S., the jury should have harbored reasonable doubt whether any sexual contact occurred." Obviously, however, it is not physically impossible for intercourse to have occurred without that sort of trace remaining. S.S. was not asked whether Bass used a condom or whether he ejaculated. She did testify that he stopped when he felt "something wet,"—her blood—and that could mean that he stopped prior to ejaculation. There was medical testimony, moreover, to the effect that S.S.'s bleeding was likely to have removed evidence of intercourse from her vagina. Similarly, showering afterwards could have removed any external traces of intercourse. The fact

that neither sperm nor semen was found on S.S., therefore, did not render her testimony contrary to physical laws or otherwise ineligible for jury consideration.

Nor did L-S's initial statement to the investigator that S.S. hurt herself with the cat toy and blamed it on Bass entitle him to a directed verdict. As the investigator testified, that statement did not jibe with the timing of events and was apt to have been instigated by L-S's mother, Bass's girlfriend, as L-S indicated to the investigator at the time. That impression was confirmed at trial both by L-S's testimony that she had not seen S.S. masturbating with the cat toy and by the physician's testimony that the cat toy was smaller than he would expect the object to be that caused S.S.'s significant injury. The credibility of L-S's police statement, in other words, like the credibility of witnesses in general, was for the jury to assess. The trial court did not err by allowing the jury to perform its role.

CONCLUSION

In sum, the directed verdict standard is not whether a rational juror viewing the evidence favorably to the defendant might acquit, but rather whether such a juror viewing the evidence favorably to the Commonwealth might convict. Because here a rational juror crediting S.S.'s testimony could find beyond a reasonable doubt that Bass subjected an eleven-year-old child to sexual intercourse, the trial court properly denied Bass's motion for a directed

verdict. Accordingly, we affirm the October 13, 2010 Judgment of the Bourbon
Circuit Court.

All sitting. All concur.

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